No. 71-893

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARTHUR ERNEST LANE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The opinion of the Board of Immigration Appeals appears at Pet. App. A.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1971. The petition for a writ of certiorari was filed on January 10, 1972. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was "convicted" of a marihuana offense within the meaning of Section 241(a)(11) of the Immigration and Nationality Act and is therefore deportable notwithstanding the subsequent expungement of his conviction under California law when he completed probation.

STATUTES INVOLVED

Section 241 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has

been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;

* * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representa-

tions in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

Section 1203.4 of the California Penal Code is set forth at pages 3-5 of the petition.

STATEMENT

In July 1968, petitioner, a resident alien in this country and a citizen of Great Britain, was charged in the Superior Court of California with possession of marihuana. Upon his plea of guilty, he was convicted and placed on probation for three years on the conditions, *inter alia*, that he pay a $240 fine and a $60 penalty assessment. In August 1969, the Superior Court of California terminated petitioner's probation. Pursuant to Section 1203.4 of the California Penal Code (Pet. 3-5), petitioner was permitted to withdraw his guilty plea, and the accusation was dismissed (Pet. App. C).

Thereafter deportation proceedings were initiated and in May 1970, pursuant to Section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(11) (*supra* pp. 2-3), petitioner was ordered deported on the basis of his marihuana conviction. The Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. A) and the court of appeals affirmed (Pet. App. B).

ARGUMENT

In petitioner's view, the subsequent expungement of his conviction means that under Section 241(a)(11) he cannot be deemed ever to have been "convicted" of the marihuana offense. By its own terms, California Penal Code Section 1203.4 (Pet. 4) provides that an accusation against a person may be dismissed "*if he has been convicted,*" and that, when the accusation is dismissed, the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime *of which he has been convicted*" (emphasis added). And the final paragraph provides that a conviction "expunged" under Section 1203.4 remains a "conviction" for some purposes under California law.

It is well settled that an alien adjudged guilty of a narcotics or marihuana offense is deportable regardless of any provisions of state law mitigating the penalty. *E.g., Gonzalez de Lara* v. *United States*, 439 F.2d 1316, 1318 (C.A. 5); *de la Cruz Martinez* v. *Immigration and Naturalization Service*, 404 F.2d 1198 (C.A. 9), certiorari denied, 394 U.S. 955; *Garcia-Gonzales* v. *Immigration and Naturalization Service*, 344 F.2d 804 (C.A. 9), certiorari denied, 382 U.S. 840. Indeed, although Congress has provided that pardons and recommendations against deportation by sentencing judges shall be given effect with respect to other crimes (Section 241(b)), it has expressly provided to the contrary in the case of narcotics and marihuana offenses. Narcotic Control Act of 1956, 70 Stat. 567, 575, amending Section 241(b). Thus the

California probation statute, which provides in effect a means of pardoning a convicted narcotics offender, does not limit the operation of Section 241(a)(11).[1] None of the cases cited by petitioner (Pet. 8-9) as conflicting with the decision below[2] involved Section 241(a)(11); these cases are therefore inapposite.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] Similarly, Congress amended Section 241(a)(11) to delete the requirement that a sentence be imposed (54 Stat. 673).

[2] *Pino* v. *Landon*, 349 U.S. 901; *Sawkow* v. *Immigration and Naturalization Service*, 314 F.2d 34 (C.A. 3); *Holzapfel* v. *Wyrsch*, 259 F.2d 890 (C.A. 3).

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